

Preparation of a Powerful Trial Notebook

I. ETHICAL QUESTIONS – THE PRACTICAL DO’S AND DON’TS

Avoiding Situations That May Expose You to Professional Liability

Requirements For Attorney Supervision

Evaluating Conflicts of Interest

Managing Issues of Privilege

A. Avoiding Situations That May Expose You to Professional Liability

Manage the Lawyer/Client Relationship

The main ethical challenge in the attorney-client relationship is communication with the client. Seventy-five percent of the complaints filed concern the attorney’s failure to communicate with the client.

The standard for an attorney’s ethical duty to communicate is “reasonableness.” Rule 1.4. No doubt, many complainants have unreasonable expectations of the level of communication. On the other hand, an attorney’s business, laziness, or unwillingness to contact the client simply because there is nothing new to report, is the cause of many situations wherein the client has a legitimate complaint.

There is no better way to solve the communication problem than diligently keeping the client advised and promptly returning phone calls, letters or emails. If lawyers would communicate better, they would be amazed at how happy their clients are, even if the result is disappointing. To better communicate with clients, attorneys should follow a few simple rules:

1. Answer telephone calls from the client. Do not screen calls. Do not have your secretary take the call.
2. Return the telephone calls within twenty-four hours. Document unsuccessful attempts. Document the discussion in the telephone call.
3. Communicate in writing about most, if not all, events that take place during the representation.
4. Always explain the event or matter. The attorney has an obligation to do so. Rule 1.4(b). Your obligation extends to that which is reasonably necessary. Document your explanation.
5. If the client is “unreasonably high maintenance” in that the client desires unreasonably high levels of communication, then either:
 - (a) Withdraw, if permissible, or
 - (b) Provide written guidelines that you propose for communication levels and withdraw if the client will not agree in writing to the guidelines.

Clients who complain about lack of communication are the kinds of clients who are predisposed to file legal malpractice actions on the theory that they lacked sufficient information to make an informed choice. If you reasonably communicate and if you document the

file well your defense to such an action will be considerably stronger.

The worst ethical violation an attorney can commit during the attorney-client relationship is stealing the client's money. The next worst violation is commingling the client's funds with the attorney's funds. Innocent commingling, through sloppiness or needless haste, is enough to get an attorney disbarred. Rule 1.15(a). The lawyer must separately maintain a firm account and a client trust account. Rule 1.15(b). The client trust account must be kept in the state where the attorney's office is situated. Rule 1.15(b). Complete records of such account's funds are required and shall be preserved by the attorney for five years after termination of the representation. Rule 1.15(b). An attorney must provide the client with a full accounting if requested. Rule 1.15(b). Securities shall be held by an attorney in a safe deposit box. Rule 1.15(b), Comment. If there is a dispute over fees, and, an attorney is holding client funds which could pay the disputed fees, then the attorney should safe keep the funds until the dispute is resolved. Rule 1.15(b), Comment. If creditors of the client demand the attorney release client funds to the creditor, an attorney may be forced to refuse to surrender the funds to the client. In such a case, a proper remedy maybe to interplead. Rule 1.15, Comment. In such a situation, the attorney is well advised to contact the OGC for guidance.

Besides communication and handling the client's funds, termination of the representation presents a unique challenge to the relationship. Rule 1.16 governs termination. An attorney must withdraw (mandatory withdrawal) if:

1. Representation will result in a violation of the Rules of Professional Conduct or other law. Rule 1.16(a)(1).
2. The attorney's physical or mental condition materially impairs the attorney's ability to represent. Rule 1.16(a)(2).
3. The attorney is discharged. Rule 1.16(a)(3).

An attorney does not improperly abandon the client by moving to withdraw where the client, by pro se motion, sought the attorney's removal.

With regard to the first reason for mandatory withdrawal, the attorney may be required to explain to the court. The lawyer's statement that professional considerations require termination of the representation is ordinarily accepted. Rule 1.16, Comment. With regard to discharge, an attorney must realize that a client has a right to discharge an attorney with or without cause.

To some degree, the attorney has a choice in deciding whether to terminate the relationship. An attorney can withdraw (optional withdrawal) if withdrawal can be accomplished without material adverse affect on the client's interests. Circumstances for optional withdrawal are stated in Rule 1.16(b)(1) through 1.16(b)(6).

The attorney must optionally withdraw as soon as possible, especially when facing a trial setting. The attorney must follow proper local procedures for withdrawing. A court does not have to grant a Motion to Withdraw and typically will not do so on the eve of trial setting, especially in Federal Court. An attorney who seeks an optional withdrawal on the eve of trial is well advised to also file a Motion for Continuance.

Control Client Expectations and Your Exposure to Risk

Client expectations are governed by Rule 7.1. The rule prohibits an attorney from making any false or misleading communication about the lawyer's services, in relevant part, it defines "false" or "misleading" as: (a) containing a material misrepresentation of fact or law; (b) omitting a fact resulting in a misleading statement; (c) one which is likely to create an unjustified expectation about the results the lawyer can achieve. Hence, the way to control client expectations is not to create them in the first place. For a plaintiff's counsel, many potential clients come in angry and some greedy. The lawyer's duty to counsel the client is foremost. All attorneys have a duty to keep their clients reasonably informed about the status of the case so that the client can make informed decisions. Rule 1.4. A lawyer may not promise the moon to get the business or to keep the client. Common sense dictates that when presented with a client who has \$2,000 in medical expenses and \$500 in past lost wages, an attorney cannot promise that the client will get \$500,000 from the adverse party.

There is also a difference between puffing about capabilities and bald misrepresentations concerning jury verdicts, damage awards or client endorsements that would affect a potential client's decision to choose an attorney. The latter is prohibited by the rule. In addition, any statements that constitute misrepresentation, fraud, deceit or dishonesty also violate Rule 8.4(c). This would also include stating or implying that the attorney can improperly influence a judge, government official, or agency. *See also*, Rule 8.4(c).

There still arise situations where the attorney has acted in accordance with the Rules from the beginning, without making grand promises to the client, the client has been kept fully informed of the strengths and weaknesses of the case, and the client is still dissatisfied with the "offer on the table". If the attorney realistically believes this is the best that can be obtained, and the client will not accept it, the attorney may withdraw if the client's interests will not be adversely affected. Rule 1.16(b).

The ordinary lay person does not understand the legal system and is, therefore, very vulnerable to impressions, opinions and representations by lawyers. Moreover, most people do not understand our arcane language. Hence, careful communication at each state of a representation is required, from before the retention agreement through the end of the relationship. Rule 7.1 shields the client and potential client from being misled either intentionally or unintentionally. Moreover, attorneys must always bear in mind that any statement or conduct which is dishonest, deceitful, or fraudulent is prohibited under Rule 8.4.

B. Requirements For Attorney Supervision

A law firm's partners and shareholders must put into place measures to give reasonable assurances that all attorneys in the firm comply with the rules of professional conduct. Rule 5.1(a).

A lawyer supervising another lawyer has the same duty as to the subordinate lawyer. Typically, this duty is fulfilled by the firm's provision of continuing legal education in professional ethics, either by an approved in-house program or approved CLE programs. Rule 5.1, Comment. Some larger firms have designated senior partners or committees for ethical

questions. Junior attorneys may make confidential referrals of ethical problems to the designated partner or committee. Rule 5.1, Comment. In smaller firms, ethical direction is usually a matter of informal discussion and/or admonition.

Both partners and associates are responsible for another lawyer's violation of the Rules of Professional Conduct if the lawyer orders or with knowledge of the specific conduct ratifies it. Rule 5.1(c)(1), Rule 8.4(a).

The supervising partner is also responsible for another lawyer's violation of the Rules of Professional Conduct if the supervising partner knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. Rule 5.1(c)(2). The supervising attorney must intervene if the supervising attorney knows that the misconduct occurred. For example, if the supervising attorney knows that a subordinate attorney misrepresented a matter to an opposing party in negotiations, the supervising partner has a duty to correct the resulting misapprehension. Rule 5.1, Comment.

An associate is bound by the Rules of Professional Conduct despite the fact that the associate acted at the direction of another person. Rule 5.2(a). Whether the associate had sufficient knowledge to render conduct a violation of the Rules of Professional Conduct may well be controlled by the fact the associate acted at another's direction. For example, an associate will not be responsible for filing a frivolous pleading if the associate acted at the partner's direction and the associate did not know of the pleading's frivolous character. Rule 5.2, Comment.

The rules do not provide the associate some lenience in the case of arguable positions. In "gray areas" or an area of "professional judgment as to ethical duty" where the position is reasonably arguable, the associate is entitled to follow the partner's direction. The comment provides a simple example. If a question arises whether the interest of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged. Rule 5.2, Comment.

For the associate, it may be necessary to seek guidance from outside the firm. The best way to obtain this guidance is to telephone the OGC and speak with a staff member. Your conversation will be confidential.

C. Evaluating Conflicts of Interest

The Rules of Professional Conduct are, for the most part, easy to understand. It is basic common sense that an attorney must be honest with the client and cannot steal from the client. However, it is difficult for attorneys to understand that certain situations and/or possible situations will or may compromise an attorney's duty of loyalty. Conflicts of interest present a two-fold problem for attorneys, first, inability to recognize them, and, second, failure to properly react to an existing conflict.

Conflicts are difficult to identify for several reasons. First of all, conflicts are difficult to understand. They are subtle. Their analysis requires more than just a passing thought. Second, although attorneys study conflicts and are tested on them in law school and in Bar examinations, thereafter attorneys do not receive sufficient training and analytical process reinforcement to become astute at spotting them. Third, at the outset of a new matter, attorneys focus on "how should I do this job" rather than "is it appropriate for me to do the job." Fourth, the

pressure of competition forces attorneys to accept new business or keep existing business and turn their heads away from conflicts. On the other hand, an attorney can successfully identify conflicts, and thereby stay out of trouble, if the attorney understands the basic principle of a conflict and keeps a vigilant lookout for them.

The first solution to identifying a conflict is to understand the conflict's basic principle. Conflicts involve the attorney's duty of undivided loyalty. ("one cannot serve two masters.") Without undivided loyalty to the client, an attorney has a conflict. With this in mind, before and during a representation, an attorney should ask the following question:

In this particular situation, is my client receiving, or, will my client receive, my undivided loyalty?

The second solution to identifying conflicts of interest is to know the situations in which absolute conflicts exist and cannot be waived. They are as follows:

1. **Gifts.** An attorney cannot prepare an instrument giving the attorney a substantial gift from a client, unless the donee (client) is related to the attorney. Rule 1.8(c).

2. **Literary Rights.** Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.8(d).

3. **Loaning Money.** An attorney shall not loan or give money to a personal injury plaintiff (or any other client) in connection with pending or contemplated litigation. Rule 1.8(e),

4. **Representing Opposing Parties.** An attorney, ordinarily, may not act as an advocate against a person the lawyer represents in some other matter, even if wholly unrelated. Rule 1.7,

5. **Two Criminal Defendants.** An attorney cannot represent more than one defendant in a criminal case. Rule 1.7(b),

These situations are absolute danger zones and the attorney must avoid them. However, if a client wants an attorney to devise an instrument giving the attorney a gift, the attorney can refer that client to other reputable attorneys. If a client needs and wants a loan, the attorney can refer the client to a company who will loan litigants money as long as the attorney thoroughly explains how the loan process works.

The third solution to identifying conflicts is to know the areas where conflicts commonly develop. They are as follows:

1. **Representing more than one party in litigation.** For example, when the party's testimony is substantially different, there is a conflict of interest in representing both. Rule 1.7(b), Comment. Another example is representing a passenger and host driver against an adverse driver when there is testimony that the host driver was at fault. When attorneys represent one or more plaintiffs whose claims are larger than the available insurance and/or assets, there is a conflict. Rule 1.7(b), Comment.

2. **Equity for a fee.** Taking an equity position in an entity as payment for services rendered to the entity. Rule 1.8(a),

3. **Undisclosed interest.** Referring clients to a business the attorney has an undisclosed interest in is a conflict without disclosure and consent. Rule 1.7(b),

4. **Insurance defense counsel.** An attorney may be paid from a source other than the client, if the client is informed and consents and the arrangement will not compromise the attorney's loyalty. Rule 1.8(f), 1.7(b),

5. **Sexual relations with the client.** This is a conflict because it clouds the attorney's ability to give objective advice.

6. **Questionable conduct.** If the probity or conduct of the attorney in the matter is questioned, then there may be a conflict because the attorney may not be able to give objective advice. Rule 1.7(b), Comment.

7. **Wills.** Preparing Wills for several family members may pit interests against interests. Rule 1.7(a), Comment.

8. **General counsel and board member.** Acting as general counsel for a corporation while also being a board member, may be a conflict because the attorney may be called upon to advise the corporation in matters involving the Board of Directors. Rule 1.7(b),

9. **Representation against former clients.** Whether a conflict exists depends on whether the representation is on the same matter or a substantially related matter. Representation on the same matter is prohibited. When the matter is substantially related, the test is whether the attorney was so involved in matters of that type that such representation can be regarded as changing of sides. Rule 1.9.

Finally, another way to identify a conflict is to review the rules, comments and available authorities. The main conflict rules are:

Rule 1.7--The General Rule

Rule 1.8-- The Prohibited Transaction/Matter Rule

Rule 1.9 -- The Former Client Rule

The rules can be frustrating because they are deliberately open-ended. On the other hand, the comments to the rules lend specific guidelines. For further guidance, at least as to the OGC's interpretation of the rules, consult the State Bar website. At this website, the OGC's informal opinions can be reviewed. The opinions are brief and specific. In addition, the OGC is happy to answer discreet hypothetical questions over the telephone. They will confirm their answers in writing. If, after consulting the rules, comments and/or informal opinions, there is still some doubt in a practitioner's mind, the attorney should contact the OGC by telephone and discuss this matter with a staff member.

It is also important to recognize the impact that a "big case" or "big representation" has on a lawyer's inability to identify a conflict of interest. Human nature being what it is, an attorney will almost always convince himself or herself that there is not conflict of interest so as to avoid having to give the case up. This cautionary advice should be heeded by all attorneys trying to identify conflicts of interest.

D. Managing Issues of Privilege

Client Misconduct

An attorney's first duty is that of counselor. In all instances where a client's misconduct becomes known to the attorney, the attorney must fully advise the client of the nature of the misconduct and the possible consequences. Rule 1.2(d) and Comment. In those cases where the attorney has a duty to disclose the misconduct, he must fully advise the client of that duty and encourage the client to make the disclosure first. Rule 1.2(e) and Comment. If the client refuses, the attorney must then take the disclosures described in Section D. Rule 3.3(a)(2) and (d). In all instances where the representation will result in assisting or perpetrating client misconduct, the attorney must decline or withdraw from the representation. Rules 1.16(a)(1) and 1.2.

Rule 1.16 governs termination of the attorney-client relationship. Rule 1.16(a)(1) requires an attorney to decline or withdraw from the representation if the representation will result in a violation of the rules of conduct. For example, if an attorney is hired to prepare documents to enable a client to obtain financing and, during the course of representation, learns that financial statements prepared by the client are falsified, he must encourage the client to "come clean." If the client will not, the attorney must withdraw, because, under Rule 1.2, such would constitute assisting a crime or fraud. An attorney does have some leverage in that the withdrawal can be "noisy". Rule 1.16(d) does not prevent the lawyer from giving notice of the withdrawal to other parties, and the lawyer is not prohibited from taking steps to disaffirm his prior work. (Attorney should return check misappropriated by conservator to Court).

Under Rule 1.6(b) an attorney may withdraw in several situations involving client misconduct: (1) the client "persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) the client has used the lawyer's services to perpetrate a crime or fraud; or (3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent. The client should be fully counseled that, with regard to commission of a future crime or fraud, the attorney could be compelled to testify to communications with the client under law.

What happens when the attorney discovers a crime or fraud and the client denies it? First, the client must be fully advised that no false evidence can be used by the attorney, be it documentary or testimonial. Rule 1.2, 3.3 and Comments. If the false facts are already before the court, the client must again be advised that the attorney has a duty to report the same. Rule 3.3. If the attorney believes that he is assisting in the perpetuation of a crime/fraud, he must withdraw. Rule 1.16. If an attorney is unsure whether his continued representation constitutes a violation of the Rules, he should call Chief Disciplinary Counsel immediately for an informal opinion.

In summary, an attorney must always provide a client with clear and complete advice concerning current or contemplated conduct. The attorney must also advise the client that he must withdraw when the representation will cause him to violate the Rules. He must advise the client of the requirement to disclose this evidence and that no false evidence can be used in the proceedings. Hopefully, the advice will encourage the client to take the necessary corrective measures. If not, the attorney is bound by the rules to withdraw.

If the client's misconduct does not cause the attorney to violate the rules, but does involve criminal, fraudulent or repugnant conduct, the attorney may withdraw. The client must be given notice and reasonable opportunity to acquire other counsel.

When Confidentiality Conflicts with Personal Responsibility - What to Do

Confidentiality involves two separate concepts. One is contained in Rule 1.6. Confidentiality of Information; and the other the attorney-client privilege. The attorney-client privilege applies only to confidential communications, whereas Rule 1.6 applies to all information acquired relating to the representation. Hence, Rule 1.6 is much broader. The Rule protects all

information relating to the representation. It protects information acquired from any source relating to the representation, be it the client, documents acquired during the representation or information from third-party interviews. Generally, an attorney may not use information acquired during the representation to the disadvantage of a former client. Rule 1.9(b).

Confidentiality and personal responsibility most often clash when an attorney is faced with knowledge of a client's past, present and/or future crimes or frauds. The questions for the attorney become what, if anything, may the attorney disclose, and at what point may he/she disclose it. The answers to these dilemmas may be found in exceptions to Rule 1.6, Rules 1.2(d), and 3.3 and case authorities.

The Scope of the Attorney-Client Relationship

Before reaching the issue of whether an exception to confidentiality applies, courts first look at the scope and timing of the attorney-client relationship. Courts look closely to determine whether the information acquired or communication occurred during the representation, and whether it related to the subject matter of the representation.

Information acquired prior to an attorney-client relationship is not protected.

Similarly, an attorney cannot make information acquired prior to the representation privileged by entering into an attorney-client relationship with a person.

Matters outside the scope of the subject matter of the representation are not confidential. Communications contained in letters between an attorney and his client were found not privileged where they related to a personal relationship between the attorney and the client and not the subject of the representation in a divorce. A note about a business matter sent to an attorney by a client was held not confidential, where it was found that the attorney and client were also lifelong friends and the attorney considered the note friendly but not confidential.

Rule 1.6(b)(1) gives an attorney the discretion to reveal information in order to "prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

Attorneys are encouraged to counsel the client against taking such action, but if unsuccessful, may disclose the information to the intended victim or appropriate authorities. Rule 1.6, Comment. An attorney may also take into account such factors as the nature and length of the representation and the client's state of mind, taking into account that the client may "cool off" and change her mind. Rule 1.6, Comment. The rule is discretionary and defers to the attorney's judgment in the matter. Rule 1.6, Comment. The attorney must always carefully weigh the principles of full disclosure and trust underlying the general rule of confidentiality with the need to protect society. Rule 1.6, Comment.

The lawyer may not reveal the information relating to past crimes or fraud. A classic example is the case where the attorney learns from the client that she has murdered two children and hidden the bodies. The lawyer wants to reveal the location of the bodies to the anxious parents. A heart-wrenching situation for the lawyer? You bet. Should he provide the information to the parents or authorities? Absolutely not! To do so would violate Rule 1.6 and subject him to discipline. (May not reveal information concerning misappropriation of funds).

Crimes Other Than Death or Serious Harm and Fraud

What should an attorney do when he learns that a client has committed a less serious criminal or fraudulent act in the past, is doing so currently, or intends to do so? Several rules govern the lawyer's conduct in this regard. Rule 1.2(d) prohibits a lawyer from counseling a client to commit a crime or from assisting in such conduct. Certainly, the lawyer may and should

counsel the client not to engage in the conduct. Furthermore, the lawyer is not prevented from conducting a thorough analysis of the law, including the parameters permitted and prohibited by the courts. Rule 1.2(d), (e) and Comment. This is not to say that an attorney may demonstrate to the client how to commit the crime or fraud without getting caught. Rule 1.2, Comment. For example, the difference between a legal and illegal representation is that of establishing a legitimate trust for tax avoidance proposes mid setting up a money-laundering scheme for a crime family. If it becomes apparent that the client intends to commit the crime or fraud despite the attorney's advice, the attorney must either decline or withdraw from the representation in accordance with Rule 1.16.

Under Rule 1.6, a lawyer may not voluntarily disclose the client's intent to commit a crime or fraud however, Rule 3.3(a)(2), prohibits a lawyer from failing to disclose a material fact to avoid assisting a criminal or fraudulent act by the client. Rule 3.3(b) creates a waiver of confidentiality found in Rule 1.6. Rule 3.3(a)(2) applies to the lawyer who discovers that evidence supplied by his client is untrue or fraudulent. The rule protects the integrity of the judicial system is requiring full disclosure, despite probable enormously adverse consequences to the client. For this reason, the lawyer should fully counsel the client to make the disclosure herself and advise her that he will be required to do so should she disregard the advice. Note that this rule requires mandatory disclosure, as opposed to the discretionary disclosure exception found in Rule 1.6(b)(1). Rule 3.3(a)(3) also requires an attorney to disclose controlling legal authority. Subsection (d) requires disclosure of all known material facts, adverse or not, in *ex parte* proceeding. Rule 3.3 also controls what is prohibited conduct. An attorney shall not make a false statement of material fact or offer false evidence. For example, an attorney may not use perjured testimony.

What constitutes a material fact? In a case where an attorney was charged with misconduct for events arising from a Social Security proceeding for disabled widow and 551 benefits. The attorney advised the client she need not volunteer that she had remarried, but that if questioned directly on the subject, she should answer truthfully. The client made several misrepresentations concerning her marital status during the hearing. In addition, the attorney asked questions designed to mislead the judge and referred to the client under her former married name.

The Supreme Court held that because the client's remarriage would not have affected the outcome of the proceedings and that no finding of fact was made concerning her marital status, the attorney did not violate Rule 3.3. (It should be noted, however, that the attorney's conduct was found to violate Rule 8.4(c) and (d), which respectively define misconduct as engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation" and conduct that is prejudicial to the administration of justice.")

Personal Responsibilities in Dealings With Third Parties

An attorney must also show candor in his dealings with third persons. Rule 4.1 prohibits an attorney from making a false statement of material fact to a third person; and, as in Rule 3.3, requires disclosure of material facts to avoid assisting crime or fraud. However, this disclosure requirement does not contain an exception to the confidentiality requirement of Rule 1.6 as in Rule 3.3 which addresses situations involving tribunals.

The Attorney-Client Privilege

The attorney-client privilege protects a lawyer from revealing client confidences when called to testify under the compulsion of order of subpoena. Because the privilege belongs

to the client, the attorney must raise the privilege unless the client has given consent to its waiver. An attorney is protected from charges of misconduct when ordered by a court to testify.

There are several situations where the courts have recognized a waiver of the privilege. The privilege is waived in cases where the client alleges ineffective assistance of counsel. The privilege is also waived where the proof of a party's claim will require proof of the contents of attorney-client communications, as in a case alleging reliance on advice of counsel. In addition, the privilege is waived when the client places in issue the subject of communications. The attorney-client privilege may not be used to enable a person to carry out a future crime or fraud. An attorney is competent to testify concerning a client's acknowledgment of a deed. The privilege is also waived to testify regarding the circumstances surrounding a testator at the time of execution of a will.

It has been pointed out that the privilege applies to "communications" only, a more narrow focus than Rule 1.6's reference to all "information" acquired during the attorney-client relationship. Under the privilege, an attorney may testify to matters outside of communications. For example, an attorney can testify to his observations of a client with regard to an insanity plea. In addition, the privilege does not apply to communications concerning non-legal matters.

Summary

In analyzing the attorney's responsibilities in light of the confidentiality requirements of Rule 1.6 and the attorney client privilege, an attorney must first look at the scope of the relationship with the client, Questions to ask are: Was the information acquired or did the communication occur during the relationship? Did the information or communication pertain to the legal matters for which the attorney was retained? If the answers are yes, the next step is to determine what information or communication must be disclosed, what may be disclosed, and what can be compelled by subpoena or order.

If the client will not do so, an attorney must disclose that a false material fact has been presented to a tribunal when it comes to the attorney's attention during the representation. An attorney also is required to disclose all material facts, whether adverse or favorable, during an *ex parte* proceeding. If the attorney discovers that the client has committed a crime or fraud, he may not disclose it and cannot be forced to disclose it by compulsion of law. On the other hand, he must either decline the representation or withdraw if he knows that the fraud or crime will continue during his representation. To continue with the representation constitutes assisting the commission of the crime/fraud, clearly a violation of Rule 1.2(d). If an attorney learns that evidence is false, he may not offer it during legal proceedings or he is subject to discipline under Rule 3.3(1) and (2). In a similar vein, an attorney may not make a material misrepresentation to a third party.

Under Rule 1.6, an attorney may disclose that a client intends to commit a crime likely to result in death or serious bodily harm. This disclosure is discretionary and carries with it the duty to carefully advise the client. The attorney may use his judgment in the matter and will not be held liable for failure to alert the appropriate person or authority. For example, the attorney may reasonably believe the client has or will "cool off" and abandon the threat. On the other hand, the attorney will not be subject to discipline for disclosing the client's intent if he reasonably believes the client intends to carry out the threat.

The attorney-client privilege protects communications and only applies where the attorney is under compulsion to testify. In general, the privilege is waived in disputes between attorney and client; in cases where it is alleged the attorney breached some duty owed to the

client; where the client has placed the matter in issue; to prevent the client from committing a contemplated crime or fraud; and where the circumstances surrounding the client's execution of a will or documents transferring property are in issue. The attorney will be protected in all situations where a court orders an attorney to testify concerning a communication.

III. EFFICIENT ORGANIZATION TECHNIQUES

Key Sections and Their Development

Color Coding

How to Cross-Reference Within the Trial Notebook

What Should Not Be Included

Building in Flexibility

Effective Management of Electronic Evidence

Automated Organizational Tools - Computerized Trial Notebooks

Being Ready to "Troubleshoot" From the Courtroom

A blockbuster damage suit has just come into your office. Your initial investigation is completed. You are prepared to file suit and begin a two year process that you hope will result in full compensation for your client and your efforts. The case may be a medical malpractice action, a products liability suit, or a complex business tort. In any event, you can expect an aggressive defense, complex issues, extensive discovery, hundreds or thousands of pages of documents, and the knowledge that the defendants will probably not pay fair compensation to the victim until a jury does justice or they are convinced that you are prepared to take the case to trial. What do you do now?

There should be three main goals in developing or choosing a trial notebook system:

1. Simplicity: It had to be a simple procedure so that everyone could understand and use the system;
2. Reduce Duplication: A system that causes more work than it saves is a waste of time and money;
3. Results: The system had to result in a file that was prepared to be taken to trial and won with a minimum amount of last minute preparation.

A Practical System

The System requires an understanding of the organization of the file from the date that suit is filed. When the process is faithfully followed, it results in a trial notebook and an accompanying file that is prepared to be carried to the courthouse for the case to be presented.

Supplies

1. One quality four-inch looseleaf notebook with a label holder on the spine

2. One set of looseleaf ring binder indexes divided into eight tabs
 3. Two sets of numerical 1 - 25 (or higher, depending on the complexity of the case) letter size indexes for the looseleaf notebook
 4. One cardboard file storage box (letter / legal size)
 5. One expanding file divided numerically 1-25 (or higher, depending upon the number of exhibits anticipated)
- Preparation of the File

Key Sections and Their Development

The first step in preparing the file is to create the trial notebook. The looseleaf notebook should be labeled, "Trial Notebook" with the case name indicated on the notebook spine.

The eight looseleaf tab dividers are then labeled:

1.	Voir	Dire
2.		Opening
3.		Witnesses
4.		Exhibits
5.		Closing
6.		Charge
7.		Law
8.		Miscellaneous

The two sets of numerical looseleaf tabs are then placed into the Witnesses and Exhibits sections of the trial notebook. The trial notebook is now prepared and ready for use as an integral part of The System.

The expandable numbered letter sized file should be placed into the cardboard letter / legal size storage box. The box itself should be labeled with the case name and file number and be labeled, "Box 1." The mechanics of The System are now complete, and your correspondence file and pleading index can be maintained in your usual filing system. The trial notebook should remain in the letter / legal size storage box.

Use of The System

The trial notebook is the key to The System. The notebook is intended to act as a blueprint for the trial of the case from Voir Dire through the court's charge. The goal is to use the trial notebook at every step of the litigation so that the blueprint is being completed as the litigation progresses. Now we will review each section of the trial notebook to see how it is used during the preparation of the case.

Voir Dire
 Whether you have standard voir dire questions which are asked in every case or particular questions concerning unique issues or problems, they should be dictated before the trial begins and placed in the Voir Dire section of the trial notebook. A list of standard questions can be included when the trial notebook is first prepared. At any time during the litigation that you think of an appropriate voir dire question, you should dictate a memo to the Voir Dire section of the trial notebook and place it in that section. In this way, the voir

dire can be reviewed when the case first comes on a trial calendar and finalized. You will know that a question is included in your trial notebook if you make a habit of dictating a memo to the Voir Dire section of that trial notebook whenever you think of an additional question that you wish to ask. In any event, once the case comes on a trial calendar and voir dire is finalized, you will not have any further preparation to make before beginning the questioning of the prospective jurors.

Opening

Different attorneys will handle the preparation of their opening statement in different ways. Whether you make an opening statement from a short topical handwritten outline or prefer to compose a complete opening statement, your notes should be placed in this section of the trial notebook prior to trial. The opening statement is generally prepared shortly before the trial of the case when there is sufficient information to bring the entire case into focus. Any ideas that you have concerning the opening statement during the development of the case should be dictated to a memorandum, and the memorandum should be placed in this section of the trial notebook for use when you sit down to prepare your opening statement before trial.

Witnesses

The Witnesses and Exhibits sections are the heart of the trial notebook and the case preparation system. When these sections are properly used throughout the litigation process, they result in improved discovery, organization, and a great reduction in the time spent preparing the case.

The Witness section is divided by numerical tabs. A cover sheet should be prepared as the first page in the Witness section. On the cover sheet entitled, "Witness List," every witness and potential witness should be listed as their name surfaces. Simply list each additional witness consecutively 1 through ad infinitum. The witness' full name should be listed and in parenthesis a brief identification.

Example:

Witness	List
1. James Jones	(plaintiff)
2. Frank Smith	(defendant)
3. Mary Jones	(plaintiff's wife)
4. Dr. Stan Smith	(orthopedist)
5. Tammy Bond (eyewitness)	

As soon as the witness' name is added to the cover list, you should turn to the correspondence numbered divider and prepare a single page which includes the following information: name, home address, home telephone number, work address, work telephone number, and cellular telephone number(s). This is the basic information you will need when the case comes on for trial to either subpoena or contact your witnesses. You should also add a copy of any statements or testimony that the witness may have given to the number corresponding to their name in the Witness section of the trial notebook. If a statement must be taken or the witness must be deposed, then immediately make arrangements to obtain their testimony. When the testimony is obtained, place a copy of

the statement or deposition summary in the section of the trial notebook corresponding to that witness. Finally, when you are prepared to determine what points you wish to make with that witness on direct examination or cross-examination at the trial of the case, prepare your outline (or the exact line of questioning if it is technical), and place the notes regarding the witness' examination in this section. It is always helpful to briefly list the support for the answer you expect so that you have a ready reference if the witness strays from earlier testimony or documentation.

Example:

The doctor did not know that he cut off the wrong leg because he was drunk. (Doctor's deposition, page 60) The doctor should have known that the right leg was supposed to be removed based on the preoperative evaluation. (Exhibit 5 - Preoperative evaluation)

The best time to prepare your notes concerning the examination of a witness will be a matter of judgment in each case. If you are not ready to prepare the entire examination but you have a question or line of questioning that you would like to remember to include in your examination of a witness, dictate a short memorandum to the file and place it in the Witness section corresponding to the number of that witness.

By listing each witness as their name appears in the case, you have created a complete witness list with sufficient information to immediately contact them or subpoena them to trial. There is also a single, readily accessible location to place statements, deposition summaries, and your notes concerning areas of questions and specific questioning. The accessibility of the information will also assist in preparing and taking of the discovery. Finally, the listing of witnesses helps avoid procrastination since it directs your attention to the existence of the witness and requires you to make a decision: Should a statement be taken from this witness? Should he/she be deposed? Or should I sit down and discuss the testimony with him/her before the trial of the case?

Exhibits

The use of the Exhibits section of the trial notebook is potentially the greatest time saving device in The System. It is also a marvelous tool to assist in and through preparation of the case. Again, the first page in the Exhibits section of the trial notebook should be entitled, "Exhibit List" corresponding to the numerical tab dividers that follow the list. Whenever a potential exhibit, document, or tangible evidence is obtained, you should follow the same procedure. For documents: make two copies immediately. Assign the document a number. Place one copy of the document in the Exhibits section of the trial notebook corresponding to the number that you have assigned to that document, and then place the other document in the corresponding number of the expandable file which is in your legal / letter size storage box. (In the event that it is important to have the original document to introduce into evidence, then the original document should be placed in the expandable numbered file. This expandable file contains all of the trial exhibits which will actually be marked and introduced into evidence at the time of the trial.)

The copy placed in the trial notebook will be used for review and preparation for depositions and for the trial attorney's use at the time of trial. The clean copy placed in the

expandable file folder will be used as an Exhibit at the time of trial.

The trial exhibit should be prepared for introduction into evidence before it is actually placed into the expandable filing system. For instance, if references to insurance must be deleted from the document, they should be removed before the document is ever placed into The System.

What happens if you have tangible evidence or a document that is either too large for the numbered filing system or is difficult to duplicate (i.e., an automobile tire, x-rays, a large blow-up)? First, you assign a number to the exhibit. Mark the exhibit with the case name, the number that has been assigned, and place it in your exhibit locker, storage room, or wherever you would normally maintain that evidence. Then prepare a memorandum that identifies the exhibit, the number you have assigned to the exhibit, and the location of the exhibit. One copy of the memorandum will be placed in your trial notebook, and a second copy will be placed in the expandable numbered file.

Example:

Johnson	v.	Jones
Exhibit		8
1-1985 Firestone tire; Serial No. 657246; Model No. 2801; Size: B-17; Markings: none; Warnings: none; Evidencing tread separation; Location: evidence locker, Hill & Bleiberg		

This memorandum should provide you with all the necessary information that the exhibit demonstrates so that you can use it during discovery depositions and without having to unnecessarily cart all the exhibits with you around the country. By following this procedure, you are creating a set of trial exhibits as the case progresses rather than having to wait until the week before a pretrial conference or the trial of the case to gather all the evidence. The exhibits will also be available to you during the entire discovery process. Once the exhibit has been placed into The System, there are a number of other steps that should immediately be taken. First, review the exhibit thoroughly and either index it or extract notes concerning the important language in the exhibit. This index, or your notes, should be placed in the trial notebook under the Exhibits section and immediately in front of your trial notebook copy of the exhibit. This step forces you to review the exhibits as they are obtained and placed into the file, and also extracts the important information from each exhibit so that you can quickly find the material in your trial notebook during discovery depositions or trial. Second, you should ask two questions when you review each exhibit:

1. How can I get this exhibit into evidence?
2. Do I want to use this exhibit to question any witnesses?

If you can answer those questions after reviewing the exhibit, then your job is completed. If there is a particular witness or witnesses who can identify the exhibit so that it can be admitted into evidence, then turn to the Witness section and make a note that witness number 7 must identify and authenticate document number 15. Make an additional note in the Exhibit section under document number 15 indicating that witness number 7 can

identify and authenticate this document. Likewise, whenever you come to an exhibit that you want to use in the questioning of a witness, turn to that witness in your trial notebook and enter a note indicating that the witness should be examined concerning exhibit 17, page 32. In the event that you cannot determine how the document can be placed in evidence, then you should immediately research the law or investigate to determine the procedure or the identifying witness that will be necessary to have the document admitted into evidence. If there is an important point of law concerning the admissibility of the evidence, a short memorandum should be prepared, and the memorandum should be placed in the Law section of the trial notebook. There should also be a note included in the Exhibits section stating that there is a memorandum of law concerning the admissibility of this document in the section of the trial notebook on Law.

Example:

Exhibit 8 - certified copy of a guilty plea in Traffic Court (SEE legal memorandum regarding the admissibility of certified court records without further authentication)

If the admissibility of the document depends upon the testimony of additional witnesses, remember to add the witness' name to the Witness list section of the trial notebook. Finally, as each exhibit is added to The System, if any additional discovery or investigation is required as a result of your review of the exhibit, then schedule it immediately.

When an exhibit has been added to the file, you will know that the exhibit has been reviewed, that a copy is available for review in your trial notebook, that the important information concerning the exhibit has been extracted and can be found in the trial notebook, that a complete copy of the exhibit is contained in your expandable file and is ready to be introduced into evidence, that the admissibility of the document has been considered and the witnesses and law concerning its authentication and admissibility are contained in the trial notebook, and that any additional documents, witnesses, investigation, or discovery that is required as a result of your review of the document has been initiated. This is the bare minimum that can be expected as a result of the receipt of evidence to be used in the trial of the case. While it may seem like a great deal of work to perform concerning every document that is received, it is actually a procedure for doing everything that is absolutely necessary when the document first reviewed and avoiding the necessity of performing the same work three or four times under crisis conditions.

Closing Argument

Like the opening statement, the closing argument is approached differently by different trial lawyers. The Closing Argument section of the trial notebook should be used to list important points in argument that can be made at the conclusion of the case. When an argument comes to mind during the preparation of the case or during trial, simply make a note for reference in this section of the trial notebook.

Charge

The jury charges are prepared, and a copy of each charge should be placed in this section

of the trial notebook. Also prepare a Charge Conference Index which lists the jury charges by number and subjects and provides for a notation to be made concerning whether the court will give the charge, not give the charge, give the general principle of law, and whether the charge was withdrawn or dealt with in another manner. The charges that you want to use at trial can be conveniently listed in the Charge Conference Index as they come to mind during the preparation of the case.

Law

Whenever you anticipate a point of law that will arise during the trial of the case, it should be immediately researched and a very brief memorandum and/or a copy of the controlling decision can be placed in this section of the trial notebook. Some attorneys prefer to prepare a trial brief concerning the main issues in the case, and this would appropriately be placed in this section of the trial notebook as well.

Miscellaneous

The Miscellaneous section of the trial notebook can be used to retain any information that does not properly belong anywhere else in the trial notebook. We have used this section of the trial notebook as a “brainstorming” device to efficiently and creatively focus attention on specific issues and problems in the case. This is a specific technique that we have developed, although it is not an essential part of The System for organizing a complex case for trial.

Our brainstorming technique works this way: We identify a problem, legal, or factual issue. We list the issue and then make a comprehensive list of witnesses, exhibits, arguments, and tactics that can be used to effectively deal with the issue. The purpose is to spawn as many ideas as possible in a concentrated effort rather than dealing with a problem in a piecemeal fashion or defensively. The technique can be used to deal with essentially any problem that arises in a case. As an example, assume you have a serious personal injury case involving a piece of industrial machinery, and the defendant has taken every opportunity to point out that the equipment is 30 years old. You are concerned that the defendant’s argument will prejudice the jury.

Example:

Issue: Age of product

Witnesses, Exhibits, Arguments, and Tactics:

1. Design Engineer: show that the machine was designed for many years of use and they anticipated that it would still be in service decades after the equipment was sold
2. Useful Life: show that the useful life for this machine and other similar machines is typically three to four decades
3. Demonstrate the difference between the useful life of consumer equipment, i.e., vacuum cleaner, and heavy industrial equipment
4. Use an expert design engineer to educate the jury regarding the useful life of

- heavy industrial equipment
5. Show that other manufacturers used a safer design in equipment manufactured at the same time as the subject produce
 6. Show that the defendant manufactured a safe, but more expensive piece of equipment, at the time this machine was manufactured
 7. Show that the manufacturer was aware that these machines continued to be in use at the time of the victim's injury because they continued to sell replacement parts for the equipment
 8. Show that the manufacturer knew the machine was dangerous when it was designed because they had knowledge of injuries before the date this machine was manufactured
 9. Show that the manufacturer never placed any limitations on the useful life of the machine
 10. Show that the machine violated technical standards which were published prior to the time of manufacture
 11. Request to charge that the age of a product alone does not relieve a manufacturer of the duty to use ordinary care in the design and labeling of the product
 12. Opening Statement: Acknowledge the date of manufacture and tell the jury that the evidence will show that the machine was dangerous when it was designed, the manufacturer knew it did not meet the standard in existence at the time that the manufacturer was aware of injuries caused by the machine before it was manufactured, that the manufacturer had manufactured the product for 20 years before this product was sold without making changes in the design, that it did not meet the state of the art in the industry at the time of the manufacture, etc. In other words, undercut his argument before he gets a chance to speak.
 13. Show the disparity of knowledge between the manufacturer and the victim. The manufacturer had been in this business for 50 years and knew what they were doing when they manufactured a cheaper, less safe product. The victim did not have 50 years to learn about these dangers. Each of these ideas may lead to further investigation and/or discovery. New witnesses should immediately be listed in the trial notebook. Additional exhibits should immediately be listed in the trial notebook and incorporated into the file. New charges should be added to the Charge section of the trial notebook, and a note should be made in the Opening Statement section concerning that tactic. The list can obviously be added to many times during the course of the litigation. It can also be used as a quick reference list during closing argument.

CONCLUSION

When the case comes on a trial calendar, there will still be a great deal of work to be done before presenting the case to a jury. The hope is that the time before the trial can be spent putting the finishing touches on a case and considering tactics, strategy, and the preparation of witnesses rather than attempting to organize a gargantuan file. By the time a case reaches a trial calendar, the trial notebook, your blueprint for the trial of the case, should be completed.

